No. 92-1028

In The

Supreme Court of the United States

October Term, 1992

ROBERTA McLAREN,

Petitioner,

vs.

IMPERIAL CASUALTY & INDEMNITY CO. and SPECIAL RISKS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

As a matter of Texas insurance contract law, does a liability policy apply to a police officer who forces a female traffic offender to perform an oral sex act, when the policy language specifically covers only wrongful acts arising out of law enforcement activities performed within the regular course and scope of the duties of the insured?

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COME NOW Imperial Casualty & Indemnity Company and Special Risks, Inc., Respondents, respectfully filing this, their Brief in Opposition, and praying that the Court deny Roberta McLaren's Petition for Writ of Certiorari.

STATEMENT OF REMONSTRATION REGARDING THE CONTENTS OF THE PETITION

The Petition for Writ of Certiorari received by counsel for Respondents lists initially seven "Questions Presented" (Pet. at i-iv). In the main body of the Petition, however, there is reference only to four "Reasons for Granting the Writ," and those four do not correlate to the seven "Questions Presented" (Pet. at 14-30). This is not only confusing, but as well appears to disregard Rule 14.1(j) of the Rules of the Supreme Court.

STATEMENT OF THE CASE

Because Respondents disagree with some of what Petitioner has included in her Statement of the Case, Respondents are obliged to note such disagreement herein.

Petitioner, Roberta McLaren, sued the City of Bedford, Texas, and Bedford Police Office Larry Taylor in Texas state court. Petitioner settled with the City of Bedford, and obtained a judgment for damages against Taylor, who failed to appear or defend, in June, 1989.

Petitioner states in her petition that "[f]ollowing the rendition of judgment, McLaren discovered that Taylor was the beneficiary of a liability insurance policy obtained for him by his employer, the City of Bedford . . . ." (Pet. at 8). That statement is false.

McLaren had given notice of her claim to Imperial Casualty and Indemnity Company over two years prior to the date of the state court judgment (R. 792). Respondents are not sure why Petitioner feels the need to mislead this Court as to the date she became aware of the insurance policy. Either it is an effort to avoid limitations problems, or it is an attempt to counter the expressed feeling of both the district court and the Court of Appeals that there

are "hints of collusion" in Taylor's absolute default (Op. at 13). Whatever Petitioner's reasons, Respondents want the record to be clear on the point.

Petitioner also complains that she was not given the opportunity to reply to Respondents' request for panel rehearing (Pet. at 9). While, technically, Petitioner replied to Respondents' Suggestion for Rehearing In Banc and not, *per se*, the Petition for Rehearing, the substance of Petitioner's filed reply went directly to the heart of the issue in the case. Petitioner was not somehow denied any "right" to respond.

REASONS FOR DENYING THE WRIT

This case involves a purely state law question regarding the interpretation of a law enforcement liability insurance policy. The Court of Appeals' decision does not conflict with any decision of this Court or of another Court of Appeals. There is no federal question. There is no gross departure from the accepted course of judicial proceedings such as would call for an exercise of this Court's supervisory powers. In sum, this case presents no special or important issue justifying review by certiorari.

I.

THE COURT OF APPEALS CORRECTLY APPLIED TEXAS LAW.

The Court of Appeals found that the actions of the police officer were not covered under the language of the policy, which specifically provided coverage only for acts or omissions within the scope of "employment or official duties pertaining to the law enforcement functions of the Insured," and then only if "committed in the regular course of duty" (R. 504; Petitioner's Appendix E). The Court of Appeals properly construed the policy in light of Texas law and found no legal ambiguity.

No doubt recognizing the grounds justifying certiorari review were lacking. Petitioner has tried to manufacture a "federal question" where none exists. Suddenly, and for the first time anywhere, Petitioner equates her claim to "sexual harassment in the workplace" issues, arguing that the Court of Appeals has somehow "nullified" the reach of Title VII, 1964 Civil Rights Act (Pet. at 14-15).

This is not a "workplace" case. Title VII has no application whatever. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), a Title VII case, has no application whatever. Petitioner's attempt to somehow implicate federal employment law is clearly meritless. Moreover, the "workplace" theory was not timely raised below and thus may not be raised here for the first time. *Ellis v. Dixon*, 349 U.S. 458 (1955).

Petitioner continues erroneously to assert that the Court of Appeals "determined" the insurance contract was ambiguous (Pet. at 21). It did not.

First, Petitioner seems to maintain that the withdrawn original opinion of the Court of Appeals still has some sort of force and effect. Citing the withdrawn opinion is hardly a candid maneuver. As to the opinion on rehearing, the Court of Appeals did not determine that there was legal ambiguity, but rather found that there was an "abstract" ambiguity, which was not "real", when review in the light of accepted Texas law (Op. at 5, 7).

The Court of Appeals rightly found that for conduct to be within the course and scope of employment in Texas the conduct must be like that authorized by the employer and in furtherance of the employer's interests (Op. at 7). *Smith v. M System Food Stores, Inc.*, 297 S.W. 2d 112 (Tex. 1957). The Fifth Circuit went on to hold that, under clear Texas law, the police officer's conduct was not within the scope of employment, and thus not covered by the policy. There is nothing erroneous about this holding.

In Texas, parties of a contract are presumed (1) to know the law extant at the time of the contract and (2) to have intended that the contract language be construed in accordance with existing judicial interpretations. *Austin Building Co. v. National Union Fire Ins. Co.*, 432 S.W. 2d 697 (Tex. 1968); *Foundation Reserve Ins. Co. v. Cody*, 458 S.W. 2d 214 (Tex. Civ. App. - Dallas 1970, no writ); *United States v. Myers*, 363 F.2d 615 (5th Cir. 1966). The Court of Appeals correctly recognized that the Texas Supreme Court's opinion in *Smith v. M System Food Stores, Inc., supra,* directly interpreted the policy language at issue. Therefore, the meaning of that language was fixed under Texas law at the time of the issuance of the policy. There was no real ambiguity.

Applying the now-established policy meaning to the facts of the case, the Court of Appeals was easily able to conclude that there was no coverage, because the conduct was not within the regular course and scope of a police officer's duty (Op. at 7-8). There was no need to resort to the rules construing an ambiguous policy against the issuer. The Court of Appeals committed no error in resolving this simple issue. This case merits no further consideration.

II.

THERE WAS NO NEED TO CERTIFY A QUESTION TO THE TEXAS SUPREME COURT.

Even if a petitioner has standing to complain on certiorari that a Court of Appeals did not certify a question to a state supreme court, nothing is presented for consideration by this Court. Neither the record nor the appendix reflects anything upon which this Court could base a review of the matter. Moreover, certification is a decision left to the discretion of the Court of Appeals. *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974).

III.

PETITIONER FAILED TO RAISE THE ISSUE OF DENIAL OF DUE PROCESS AND OBTAIN A RULING ON THE ISSUE IN THE COURTS BELOW.

Petitioner states in her application that the Court of Appeals' correct application of state law as enunciated in *Murray v. San Jacinto Agency, Inc.*, 800 S.W. 2d 826 (Tex. 1990) denied her due process of law. However, this issue was never raised at the district court level nor was it ever raised by Petitioner or ruled on by the Court of Appeals. Because it was never put in issue before the courts below, this contention should not be considered by the Court. *Rogers v. Lodge*, 458 U.S. 613, 628, fn. 10 (1982); *Adickes v. Kress & Co.*, 398 U.S. 144, 147, fn. 2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). This issue therefore merits no consideration.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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